IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01489/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2015	**On 5 January 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SHAH RAHUL HASAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Bremang, Counsel, instructed by Haque and Hausman solicitors
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made. However, the Appellant's children are to be referred to only by the initials ST and SRH.

DECISION AND REASONS

Background

1. This is an appeal by the Appellant in relation to the decision of First-tier Tribunal Judge Gladstone, promulgated on 23 September 2015, dismissing the Appellant's appeal ("the Decision"). It comes before me in relation to whether the Judge made an error of law in the Decision, permission to appeal having been granted by First-tier Tribunal Judge Martins on 16 October 2015.

2. The Appellant claimed to have entered the UK in 2003 with a visa as the spouse of Ms Tahera Begum. He then applied for indefinite leave to remain in that capacity and that was granted. The marriage to Ms Begum ended in divorce. In 2008, Ms Akther applied for entry clearance as the Appellant's spouse. Entry clearance was granted to her and their son, "ST". In 2011 she was granted indefinite leave to remain as the Appellant's spouse. The Appellant's offending history began in 2003 when he was cautioned for possession of a Class A drug. Thereafter, he was convicted of battery and made subject to a restraining order in January 2014. That was in relation to his wife, Ms Akther. In relation to his children, by then his son ST and also his daughter SRH, he was not permitted unsupervised contact and could only make contact with them via solicitors. He was restrained from going near their school. In March 2014 he was convicted of robbery and possessing a knife blade/sharp pointed article in a public place. He was sentenced to sixteen months and two months to run consecutively. His offending includes other offences and there have been a number of instances of domestic violence. The children have been subject to child protection plans. The Respondent made a decision dated 15 July 2014 that section 32 UK Borders Act 2007 applies to the Appellant and a deportation order was signed on 14 July 2014.

3. The appeal came before the First-Tier Tribunal on 3 September 2015. Shortly before that hearing, on 11 August 2015, the Appellant made an application to the family court for an order for contact with his children. That followed earlier proceedings for a supervision order from which the Appellant had withdrawn in 2012. Shortly before the promulgation of the Decision, on 16 September 2015, the East London Family Court made an order giving the Appellant one hour of supervised contact per fortnight. At the hearing, Ms Brenang produced a copy of a further order which followed mediation on 8 December 2015. The order which is the final order in the case provides for the Appellant to have supervised contact increased to two sessions of one hour each fortnightly in December, increasing after the second session to two hours per fortnightly session in January continuing for three months. After the period of supervised contact, it is intended that there should be supported contact for two hours per session for a further three months, increasing to three hours fortnightly in the community from July 2016 and to five hours per session from September 2016. Accordingly, eventually, the Appellant will be entitled to direct contact albeit in the community of approximately ten hours per month.

Submissions

4. The grounds on which the Appellant submits that an error of law was made are that the Judge refused to adjourn pending the outcome of family contact proceedings. The Appellant asserts that the Judge should either have adjourned to permit those proceedings to take their course or should have allowed the appeal, thereby requiring the Respondent to consider the grant of a short period of leave until the conclusion of those family proceedings. Although the grounds contained also a submission that the Judge had erred in failing to take into account the order from the family court at the initial contact hearing notwithstanding that this was dated after the hearing, Ms Bremang sensibly did not pursue that point before me. The grounds also asserted that the Judge had failed to properly consider Article 8 ECHR outside the Rules because the children's best interests were not taken into account.

5. Ms Bremang relied in her grounds on caselaw relating to the interaction between immigration and family proceedings. This included MS (Ivory Coast) 2007 EWCA Civ 133 and MH (pending family proceedings – discretionary leave) Morocco [2010] UKUT 439. The grounds referred also to the headnote in RS (Immigration/family court liaison: outcome) [2013] UKUT 82 (IAC). As I pointed out to her, that case was the outcome of an earlier case which provided guidance on this issue and was therefore of more relevance ([2012] UKUT 218 (IAC)). That guidance was applied in another case of Nimako-Boateng (residence orders – Anton considered) [2012] UKUT 216 (IAC) where the Tribunal held that on the facts in that case, the First-Tier Tribunal Judge had not erred in failing to take into account evidence from the family court decisions because those contained no useful evidence. I suggested to Ms Bremang therefore that the caselaw did not necessarily provide that an adjournment or an allowing of the appeal was an inevitable consequence in all cases where there were ongoing contact proceedings. The guidance given in RS was approved by the Court of Appeal in Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363. In relation to the best interests of the children, Ms Bremang pointed to [103] of the Decision where the Judge found that the Appellant has no genuine and subsisting parental relationship with the children. As a result, she submitted, the Judge had also fallen into error in failing to take account of the children's best interests.

6. Mr Kandola submitted that there was no error of law in the Decision. The Judge properly understood the basis of the application to adjourn and gave reasons why he refused to adjourn. He also submitted that there was no requirement for the Judge to consider the case outside the Rules. The Judge was entitled to find on the facts here that there was no genuine and subsisting parental relationship and on that basis the best interests of the children did not fall to be considered further. The order now made in relation to contact was limited so that if there was an error it was not

material. The best interests of the children would require to be very compelling circumstances to outweigh the public interest in deportation.

Error of law decision and reasons

7. The material parts of the guidance in RS bear repetition. They are contained in [43] and [44] of the decision in that case as follows:-

> "In our judgment, when a judge sitting in an immigration appeal has to consider whether a person with a criminal record or adverse immigration history should be removed or deported when there are family proceedings contemplated the judge should consider the following questions:
>
> (i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
>
> (ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child?
>
> (iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?
>
> (iv) In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?
>
> 44. Having asked those questions, the judge will then have to decide:-
>
> (i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?
>
> (ii) If so should the appeal be allowed to a limited extent and a discretionary leave be directed?
>
> (iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?
>
> (iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of

the family proceedings is the maintenance of family contact between him or her and a child resident here?"

8. In this case, the Judge dealt with the adjournment request as set out at [55] of the Decision, at [58] onwards in the following manner:-

> "58. After considering all the above, I noted the date of the family court application, 17 August 2015, and the reason given for the delay in making such application. There had been reference to an intention to make such an application at the various CMRs and proceedings had now been issued. I considered that Ms Akther could make her intentions clear to the court or to her solicitors, but she had not done so. There was nothing directly from her either, and the information was from a mutual friend, apparently, who had also not submitted a statement and was not present. I considered that there was sufficient evidence before me to proceed with the appeal.
>
> 59. Having been directed to the family court application, I was concerned that it appeared to be, at best, inaccurate, for example at page 28 of the bundle in response to whether there had been previous or ongoing proceedings for the children, the answer was no, yet there had been a supervision order. It appeared that the family court was not being given full information.
>
> 60. The appellant had also told me that he was of no fixed abode, spending two unspecified nights of the week at a friend's address, and other nights in various bed and breakfast establishments, which was not reflected in the application to the family court or in the accompanying statement"

9. The clear inference from the Judge's remarks is that he was suspicious as to the genuineness of the Appellant's intentions in relation to contact with his children due to the timing of the application. He also appears to have thought that if the family court was made aware of the Appellant's real intentions and circumstances, he would not be given contact and that unless Ms Akther was willing to allow the Appellant to have contact, it would not be granted. Having found that the Appellant had no contact with the children since October 2013, he thereafter proceeded on the basis that the Appellant did not have a genuine and subsisting parental relationship with the children. This led him not to consider their best interests in the Decision.

10. The Judge was clearly entitled to take into account the timing of the application and to be suspicious of the Appellant's motivation, particularly where the Appellant had withdrawn from earlier family proceedings. He also had regard to the date when the family court was due to consider the Appellant's application and was aware therefore that there was a hearing likely to take place in the near future. The difficulty with the Judge's approach is that by focussing on the likely motivation for the application

and what the Judge perceived as the merits of that application, he has pre-judged the children's best interests without regard to those interests as now determined by the family court. If he had considered steps (i) and (ii) of the guidance in RS, he may well have either considered that it was appropriate to adjourn (particularly bearing in mind the likely timescale for determination of the application) or to consider deportation on the alternative basis of the family court deciding that the children's best interests would be to have some limited contact with their father (as has now occurred). Unfortunately, by unduly focussing on the Appellant's motivation and his own perceptions of the likely outcome of the application, the Judge has fallen into error by failing to take into account the impact of the contact proceedings on his decision, particularly in circumstances where there was no other evidence of where the best interests of the children lay.

11. I have considered carefully whether the error could be said to be immaterial, particularly in light of the very limited contact which the Appellant has been accorded and the high public interest in deportation. However, in circumstances where the Decision is based on there being no genuine and subsisting parental relationship and where there is no consideration of what the best interests of the children require, I cannot be satisfied that the error is not material. Clearly, the Appellant has a very high hurdle to surmount on the facts of this case to show that his deportation would be unduly harsh on his children if they remain in the UK with their mother and lose direct contact with him but that issue needs to be considered.

12. I am satisfied that the Decision does contain an error of law and I set it aside. I have considered whether it is appropriate to remit the appeal to the First-Tier Tribunal. Mr Kandola submitted that I could re-make the Decision based on the evidence before me. Ms Bremang submitted that the appeal should be remitted to the First-Tier Tribunal and that further evidence would be required in relation to the contact which has begun and in relation to the children's best interests. That does not of course mean that I could not re-make the Decision following a further hearing. However, in circumstances where there has been no initial fact finding in relation to the Appellant's relationship with his children nor the impact on them of his deportation, the appropriate course is for the appeal to be remitted.

Notice of Decision

I am satisfied that the First-Tier Tribunal's Decision contains an error of law. I set it aside and remit it to the First-Tier Tribunal for the re-making of the decision. No findings are preserved.

Signed  Date 16 December 2015

Upper Tribunal Judge Smith